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No. 428 422

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

REPLY BRIEF.

ASA G. BRIGGS,
Attorney for Petitioner.

CHARLES H. WEYL,
ALLAN BRIGGS,
ALLEN V. JUNKIN,
St. Paul, Minn.,
Of Counsel.

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REPLY BRIEF.

To make our position clear and to reply to parts of respondent's brief, we wish to make this short reply.

There is, in fact, little controversy over the evidence. Some conclusions drawn from it are divergent.

Respondent says in his brief, page 20:

> "The fact is that the train *at the time* was *standing still* and there was *no movement contemplated until the engine was brought around to the rear of the train.*"

Again at page 36:

> "*Ring did not expect or contemplate any movement* of the cars *while he was between the ends thereof.*"

Again at page 42:

> "The train in question was standing still and there could be *no movement* of the train except upon the direction of the conductor, O'Leary."

Again on page 13:

> "The train came to a stop on the sidetrack.
>
> "After the train came to a stop on the sidetrack the brakeman, Quist, does not claim, nor does anyone else, that Ring told him to *move a car.*"

Counsel complain because petitioner argues that the car was not *in use* at the time of the accident although that argument is based on what they now so earnestly urge are established facts.

It is not essential that there shall be an intention not to move a car, *for any specified length of time,* to take it out *of use.* If there must be a certain length of time, how long must it be? The controlling factors must be the conditions existing at the very time of the accident. The time may be ever so short, or ever so long, if it cover the time of the accident.

It is not necessary that the car shall be standing alone and not coupled to other cars for it to be taken out of use.

It is not necessary that the car must be on a repair track to be out of use.

If the facts are as stated by respondent—then at the very time of the accident—from the time the train came to a stop on the sidetrack and until the engine should come around to the rear of the caboose—there was no intention or necessity to move this car; and *for that period of time it was out of use.*

In *McCalmont v. Penn. R. R.*, 273 Fed. 231, the car was on a sidetrack. It was to be taken to a repair track. McCalmont and a helper were shortening a chain coupling the car with the defective coupler to other cars. It was not expected then to move the car. Another car was shunted on the same track and McCalmont was killed. In this case, Ring, with the conductor, was unhooking the coupling chain on the car. It was not expected to be moved. In each case the car was on a sidetrack; each was coupled by chain; the injured person was in a dangerous position in violation of rules; each car was standing still with no intent or necessity to move it; each car was moved; each employee was killed when working on the coupling chain, the one to shorten the chain, the other to uncouple.

The Court in the McCalmont case held the car was not in use. The Circuit Court of Appeals (Sixth Circuit) sustained the holding. The Supreme Court denied a writ of certiorari January 22, 1923, and approved it in Davis vs Wolfe, Nov 12 1923

The question may be asked, can a car be said to be out of use when it is still in a train, even though it may be the intention that it shall not be hauled further in that train?

We do not think it is a question of the kind of sidetrack on which a car may be, or how it may be coupled up with other cars. It is a question, rather, of what its status is in relation to its own *use*. What is to be done with it? Respondent tells us that at the moment of the accident there was no intent to move this car and therefore no intent to then use it. Upon his own contention the car was not in use.

In the *McCalmont* case the car had not reached the repair track. In this Ring case the car had been discontinued in use as a part of the train. They were cutting it out of the train, the very first necessary act after abandoning its use.

But to our minds a far more important and clearer question than whether the car was in use is, What was the proximate cause? If there was, or if there should have been, in contemplation, a liability that this car might be moved by the uncoupling of the engine when the train was on the grade, or be moved by any other means, then the proximate and sole cause of the accident was Ring's own negligence. We will also see that even though the car was unintentionally and unnecessarily moved, that Ring's negligence was the proximate cause of the accident, or the movement itself was the proximate cause of the accident. And the fact of the existence of a defective coupler only furnished the occasion.

A very clear discussion of proximate cause as applied to this class of cases is found in *McCalmont v. Penn. R. R.*, 283 Fed. 740-1. This case is

almost a duplicate of the McCalmont case. The language is as follows:

> "It is quite apparent that the defective coupling was not the direct cause of McCalmont's injury in the same way and to the same degree as in cases where a brakeman is actually trying to make a coupling with a car *which is at the moment coming on for that purpose:* yet there was a seeming cause and effect relationship from the fact that, except for the defective coupling, McCalmont would have had no occasion to go between the cars at this point and would not have been hurt. We think the properly logical view of such situations, and the authoritative precedents to be discussed, fairly indicate that *such accidents fall into two classes—the one where the impact of the two cars which injures the workman is a part of the movement in which he is purposely participating; the other where this impact is rather a collision which is no part of the plan.* In the former class nothing happens which was unintended or which should have been avoided. The presence of the injured person between the cars is the immediate cause of the injury, and that presence was induced by the defective coupling, which is, therefore, in law, the proximate cause. *In the other class of cases the unintended and unnecessary collision is the immediate cause of the injury, the presence of the injured person at the danger point is an incident or a condition, and we must, therefore, look to see whether the defective coupler is the cause of the collision. If so, then it is the proximate cause of the injury; otherwise it is a remote cause."*

In no way did the defective coupler cause the "collision," or movement, of the train. It was the release of the air and the uncoupling of the engine both at the head of the train, at the upper end of the grade and nearly 40 cars from the defective coupler, that caused the backward movement of the cars.

The following language used in the opinion in the same case at page 741 is so clearly applicable to this case and so well expressed that we quote it:

> "If, however, there were otherwise doubt about the conclusion that the defective coupler was not the proximate cause of McCalmont's death, it would be removed by observing and applying the ruling of the Supreme Court in the *Wiles Case*, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732. This opinion points out that even in the presence of negligence by defendant which set in motion the train of events and without which the injury would not have happened, yet *the plaintiff's own conduct and negligence may be such as to become the intervening and sole proximate cause, leaving the defendant's negligence as a remote cause only.* Upon its facts as they are assumed by the Supreme Court, we cannot distinguish that case from this. It is true that the right to recover was not planted upon the Safety Appliance Act, but upon negligence under the Employers' Liability Act, and that any contributory negligence on the plaintiff's part would have diminished the recovery under the Employers' Liability Act (Comp. St. No. 8657-8665) rather than have been wholly immaterial under the Safety Appliance Act; but the court was not deciding the effect of contributory negligence,

but only whether the plaintiff's conduct was contributory negligence or was the sole proximate cause. It could make no difference whether the defendant's negligence in permitting the train to break apart and thus bring Wiles into a place where he was in danger and was killed, was a disputed inference which a jury might draw under the one act, or a presumption of law which must be indulged under the other act. The Supreme Court assumed (240 U. S. 448, Sup. Ct. 408, 60 L. Ed. 732) that there might be negligence, actionable under the Employers' Liability Act, which thus brought Wiles into the position where he was exposed to the danger of an unintended collision, just as the absence of the necessary coupler brought McCalmont into a similar position. Wiles knew, as McCalmont did, that in the regular and ordinary operation of the road such a collision as did take place was *liable* to occur at any moment. *It was Wiles' clear duty, as it was McCalmont's, to take a certain prescribed step which, if taken, would prevent the collision. In each case there was neither negligence in bringing about the collision nor cause for the collision, except the failure of the man hurt to take that step which it was his duty to take to protect himself and others. If Wiles had gone back with his flag, as his duty required, that collision probably might have been avoided. If McCalmont had set out his flag as his duty required, it is even more probable that there would have been no collision. Our affirmance of the judgment below could safely be rested on the Wiles Case alone."*

We may add, if Ring had warned the enginemen that he was going between the cars he would not have been injured.

McCalmont was engaged in *coupling* the cars *by shortening the chain.* Ring was engaged in *uncoupling the cars.* The Court in the McCalmont case uses the following language in discussing this feature:

> "We do not overlook the insistence of counsel that McCalmont was actually engaged in coupling the bad-order car to its neighbor, and that hence all doubt is removed. To say this is to beg the question. To chain together two cars which have stood for hours and may stand for hours more untouched upon a track unused save as a receiving station for the car hospital is, of course, in a certain broad sence, to 'couple' them; but the word usually describes the operation which accompanies the approach of one car to the other. A crushing impact is the expected incident of the normal coupling, and safeguards are constantly necessary; not so, necessarily, of a 'coupling' which calls for no impact."

No impact was contemplated or occurred in either of these cases.

Respondent makes extended argument (see page 17 of his brief) that the movement of the cars was unnecessary and unintended, that this unnecessary and unexpected movement of the train caused the injury. This brings the case squarely within the rules laid down in the McCalmont case and the decisions of this court therein referred to. The

facts we have before us are analogous to the collision cases. The same rules of law apply.

In *Lang v. N. Y. Cent.*, 255 U. S. 455-461, the following sentence is applicable to our case:

> "Or in other words, and as expressed in effect in the *Conarty case*, that the collision under the evidence cannot be attributed to a violation of the provisions of the law, but only that had they been complied with it (the collision) would not have resulted in the injury to the deceased."

On the other hand, if the running back of the slack in the 40 cars in the train was the natural or "liable" result of cutting off the engine which Ring had directed Quist to do, Ring's negligence in giving that direction and then placing himself in a dangerous position, contrary to the Company's rules forbidding him from doing so without first *knowing* that the enginemen had understood and obeyed signals which he was bound to give to advise the enginemen that he was going into a dangerous position, constitute the sole proximate cause of the accident. For Ring went into the dangerous position without even attempting to give any warning to the enginemen. He did this after he had directed the doing of the very thing that caused the accident, viz.: cutting the engine off the train.

Whether the cars ran back unnecessarily and unintentionally, or whether they ran back as the result liable to follow doing the thing intended and directed, the absence of liability still remains the same.

From whatever point we view the situation, the defective draw bar was only the *occasion* for Ring being where he was and in no sense was it a *contributing cause* of the accident.

This action is based on the Safety Appliance Act. The only negligence was the defective draw bar. No other negligence is claimed or pleaded. Recovery must be had under that act, or not at all, as the case now stands. Any view we take we find plaintiff barred from recovery.

The *Otos Case*, 239 U. S. 42, is quite different from this Ring case. Otos went between *moving cars* to uncouple them. There was a rule forbidding such action. The Court says in 128 Minn. 286:

> "There is evidence that in this yard it (the rule) had, with the knowledge of the yardmaster, been more honored in its breach than in its observance."

In this Ring case there is not one word of evidence of any breach of the rule to warn enginemen before going into a dangerous position. Ring did not go between moving cars to uncouple as did Otos. The Otos cars were being operated and no other negligence was shown than the defective coupler. Otos was not violating any effective rule.

The Otos case presented none of the questions arising in this Ring case.

Counsel mistake our position by assuming that we contend that the defective coupler must be the sole proximate cause of the accident. That is not

our understanding of the law, and we have not intended to use language that is subject to such construction. If there shall be any doubt about our position we believe that doubt will be cleared by this restatement.

Counsel urge a decision on this question and on the question of statutory change of the common law rule governing proximate cause. These rules seem to have been heretofore stated by this court, but the rule has not been stated as counsel would have it.

The Court refused to permit the jury to even consider the rule Ring violated. (See pages 34-35 of our brief and folios 537-538 of the Record.) The Court charged:

> Court: Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant. That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules. In other words, that acts of the plaintiff are no defense unless the act was the sole cause of the injury. (537)
>
> Mr. Briggs: Will the Court extend that instruction so as to say that this question of rules may be taken into consideration by the jury in determining whether the defective draw-bar was the proximate cause of the accident?
>
> Court: I don't believe that is the law as laid down by our Supreme Court.
>
> Mr. Briggs: The Court understands that our contention is that the defective draw-bar

was not the proximate cause of the accident, and therefore that this rule should be taken into consideration of what that proximate cause was. (538)

Respectfully submitted,

ASA G. BRIGGS,
Attorney for Petitioner.

CHARLES H. WEYL,
ALLAN BRIGGS,
ALLEN V. JUNKIN,
St. Paul, Minn.,
Of Counsel.

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vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED,
Respondent.

BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

TOM DAVIS AND ERNEST A. MICHEL,
Counsel for Respondent,
Minneapolis, Minnesota.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

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BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

The above entitled action resulted in a verdict in favor of the administrator. The motion for new trial was denied by the trial court, and upon appeal the action of the trial court was affirmed by the Supreme Court of the state of Minnesota.

Decedent was injured while between the ends of two cars, which were chained together. The draw bar of one car had pulled out. The cars were being moved to the side track.

There was no question but that decedent and the railway company were engaged in interstate commerce.

While between the cars so chained together, because of a movement thereof, decedent sustained injuries from which he died.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

This case involves only an appreciation of all the facts, and the question of whether from such facts liability follows:

There is nothing for the Supreme Court of the United States to pass on.

See *Great Northern R. Co. v. Knapp,* 240 U. S. 464, 36 S. C. 399, 60 L. Ed. 745, and similar cases.

As to liability, the case falls squarely within the cases of which *Great Northern R. Co. v. Lunch,* 239 U. S. 349, 36 S. C. 124, 60 L. Ed. 322, and *San Antonio, etc. R. Co. v. Wagner,* 241 U. S. 476, 36 S. C. 626, 60 L. Ed. 1110, are typical.

The case involves no construction of the Act of Congress, and all the questions involved in the case were purely for determination by the state Supreme Court.

Both the state Supreme Court and the District Court upheld the contention that liability had been clearly established under the Safety Appliance Act because of the hauling and moving of the cars so chained together.

This was a plain violation of the Safety Appliance Act, and the petition for writ of certiorari should be denied.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,

Counsel for Respondent,

Minneapolis, Minnesota.

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Respondent.

MOTION OF RESPONDENT TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET AND BRIEF IN SUPPORT THEREOF.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

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Respondent.

MOTION TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

Now comes the above named respondent and moves this court:

1st: That the writ of certiorari granted herein to review the judgment of the Supreme Court of the State of Minnesota be dismissed, on the ground that said writ was improvidently granted, and on the ground that facts essential to an adequate appreciation of this cause were not brought to the attention of the court by the petition for writ of certiorari herein.

2nd: In the alternative, respondent moves the court that the judgment of the Supreme Court of the State of Minnesota, be affirmed because the questions upon which the decision of the cause depends have been determined by many decisions of this court, and said questions are so well settled as not to need further argument, and on the ground that

the case involves no question of statutory construction, but only an appreciation of the facts and the question of whether liability follows therefrom.

3rd: That the judgment of the Supreme Court of Minnesota be affirmed on the ground that the petition for writ of certiorari herein was sought for purposes of delay only.

4th: In case none of the above motions be granted, then the respondent moves the court that this action be transferred for hearing to the summary docket because the case is of such a character as not to justify extended argument.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys of Record for Respondent,
Minneapolis, Minnesota.

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NOTICE OF MOTION.

The petitioner is hereby notified that respondent will, on the 6th day of October, A. D. 1924, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing and annexed motions, and each of them, and the brief in support thereof, hereto attached, all of which are now and herewith served upon you.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Received a copy of the foregoing notice and the brief thereto attached, by personal service thereof, this 11th day of August, 1924.

Asa G. Briggs
.....,
Attorneys for Petitioner.

STATEMENT OF THE CASE.

This action is one to recover damages for the death of decedent, Ring ,a brakeman employed by the defendant in interstate commerce.

The plaintiff had a verdict in the District Court. That court denied the motion of the railroad company for judgment *non obstante* or for a new trial.

The railroad company appealed to the Supreme Court of Minnesota, and that court in all things upheld the trial court, affirming the verdict.

Judgment was thereafter entered, which is in all things, final, and to review that judgment, a petition for writ of certiorari was granted by this court.

Respondent contends:

(a) That the writ was improvidently granted because this court was misled as to the facts.

(b) That the case is of a character which this court should not review.

(c) That the filing of the petition for the writ results in an unnecessary delay, inasmuch as the questions involved have been settled by the many decisions of this court.

THE UNDISPUTED FACTS.

(Figures in parenthesis refer to folios of the printed record on file in this court.)

On October 4th, 1922, decedent, Ring, was working for the railroad company as a brakeman at Budd, Iowa. The freight train, upon which he was employed, had just pulled into the Station of

Budd. It was there discovered that the draw-bar on one of the cars was defective; in fact, it had pulled out (33).

Interstate Commerce Conceded.

There was no dispute but that the train was interstate in character.

Conductor in Charge of Train.

The conductor in charge of the train was J. P. O'Leary. Decedent Ring and one Quist were brakemen. The conductor had charge of the train. Quist and decedent worked under him.

Car Used With Defective Draw-Bar.

When it was discovered that the draw-bar was defective, the train crew intended to take the defective car to a side track at this station. Decedent was killed *before the car had reached its destination.*

The conductor, O'Leary, testified as to the work being done as follows:

> "Q. And where did you discover this car with the draw-bar pulled out?
>
> A. We stopped to head in at Budd to meet an eastbound train and in starting we pulled the draw-bar out.
>
> Q. The draw-bar was pulled entirely out?
>
> A. No; the timber was broken and it allowed it to pull out half way out" (33).

It will be noticed that the crew were not dealing

with a car on a dead track. They were going to head into a side track to meet another train.

DECEDENT WORKED UNDER INSTRUCTIONS OF CONDUCTOR.

The conductor, O'Leary, testified further:

> "A. I sent this brakeman, Ring—the train stood on a reverse curve at the time,—and I sent this brakeman, Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side track.
>
> Q. And after that what was done?
>
> A. Well, we done that. We backed up and put the chain on this car and pulled the rear end of the train into the side track.
>
> Q. And did Ring *act under your directions* in helping to chain up the draw-bar of this car?
>
> A. *Yes, sir*" (33-35).

It is to be noted that Ring was acting under the direction of a superior officer in helping to chain the defective car. The defective car was to be hauled to a side track and then was to be switched out of the train. There was no evidence in the case that the car had come to rest on a dead track.

After the men got the car chained up so they could move it, the evidence showed:

> "Q. And then you pulled it up on the side track?
>
> A. Yes.
>
> Q. After you did that, did you have *any other work* with regard to this draw-bar?
>
> A. Yes, I told Ring, and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train*" (35).

It will again be noted that the work of moving the defective car was *not completed.* It was to be taken and switched out of the train. During all this time, Ring was was working under the directions of his superior, the conductor, in assisting in moving this defective car. The evidence of the conductor on this question is as follows:

> "Q. And did Ring have anything to do with this draw-bar after you got it into the side track?
>
> A. After we got on the side track I was in the rear end of the train and Ring was up by this car that had the draw-bar out and I got out and walked up to a car length from where he was and *I asked him* if he could unhook the chain and he said he didn't know, and he set down his lantern and he tried and he couldn't do it" (35-36).

After decedent was unable to unhook the chain, the conductor further directed his movement and attempted to assist him.

> "Q. And then what happened?
>
> A. And I told him to let me try it, and I couldn't unhook it. It was a heavy chain and one man couldn't handle it, and he climbed over the end of the car and got on the other side, so I was on one side of the draw-bar and he was on the other, and he was facing the east and *he reached down to lift up the chain to give the slack to me* so I could pull the chain, and the train backed up" (36-37).

While the men were between the cars attempting to manipulate this chain so that the defective car might be moved and taken out of the train, the train backed up without any signal.

"Q. And what happened to Mr. Ring?

A. I straightened up and walked back with the movement of the train and he reached in and locked his arms around the axle of this bad order car and this chain at the time was slack in there and wasn't unhooked, and he swung his body up over the chain and held back and the slack ran back and squeezed him between the chain and the bottom of the draft-timbers of this car.

Q. Now, then, when this train jerked back, you and Ring were both in there trying to unhook this chain?

A. Yes" (38).

The conductor made no claim, nor was any claim made by any one, to the effect that he was not in charge of the train, and decedent worked under his orders.

"Q. *And you were in charge of the train as conductor?*

A. *Yes, sir.*

Q. And you gave no signal to back up?

A. No" (39).

The testimony of the conductor was *not disputed* at the trial.

Defect in Draw-Bar Conceded.

There was no claim by the railroad company that the draw-bar was not in fact defective.

Neither did the defendant deny that the car with the defective draw-bar was being hauled to the side track by means of chains.

The Supreme Court of Minnesota held that the

hauling of the car to the side track and its movement there constituted a violation of the statute.

The opinion was written by Chief Justice Wilson, who stated the facts to be as follows:

> "The deceased was working on an interstate train which, on arriving at Budd, Iowa, undertook to take a siding and meet an east bound train. The switch was thrown and in starting the train to pass on to the side track a drawbar pulled out, permitting the train to separate. The crew consisted of the conductor, decedent, another brakeman and the engine men. The train was backed up to the cars which had broken loose. The front car of the portion of the train which had broken loose was coupled with a chain hooked on its front axles with the car ahead so as to pull the rear part of the train off of the main line onto the siding. Decedent *under direction of the conductor* aided in this work. The train was pulled onto the side track and brought to a stand still. The plan was *to switch the defective car* out of the train. This was in the night time. The conductor asked decedent if he could unhook the chain and he replied that he did not know, but set his lantern down, and tried and replied that he could not do it. Then the conductor tried it. The chain was heavy and one man could not handle it. Decedent got on the other side of the chain and reached down to lift up the chain to give the slack to the conductor so he could unhook the chain. The brakeman, Quist, uncoupled the engine from the train for the purpose of permitting it to go out on the main track and to the rear of the train so as to get that part of the train back of the defective car and when this uncoupling was made the disconnected portion having the air brakes released and perhaps started by the movement of

the engine, moved back, but Quist caused the air to be applied and thereby stopped the movement. The train backed up without warning and the conductor straightened up and walked back with the movement of the train. The decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and he swung his body up over the chain, apparently to ride there on in the brief movement of the train, and the slack ran back —by the head cars stopping—and as the chain was pulled straight, it squeezed the body of decedent between the chain, then under him, and the bottom of the draft-timbers of the car above him. This so injured decedent that he suffered severe pain until his death, fifteen days later" (592-597).

The Supreme Court of Minnesota in all things agreed with the trial court and held that the case came within the provisions of the Safety Appliance Act. The court distinguished the McCalmont case relied upon by the railroad company in its petition for writ of certiorari herein.

We quote further from the opinion of the Supreme Court of Minnesota:

"1. Do the facts bring this case within the provisions of the Safety Appliance Act? The defendant asserts that nothing happened while this car was chained up and hauled on to the side track, and that it there came to rest, and that it at that instant ceased to be 'used' by the carrier. *It attempts to put this defective car in the status of the car in McCalmont v. Penn. R. Co.*, 273 Fed. 231, affirmed 283 Fed. 736, wherein a car was placed on a *dead* track where an employee was later injured. In this

case the defective car was *not yet placed* to be left and in fact the equipment, the chain, used to replace the defective coupling, was still intact *and the car remained in the train of which it was a part.* There was here no break in the chain of events between the pulling out of the draw-bar and the injury. Defendant argues that on the theory of the plaintiff, if the defendant would haul the car, it would violate the act, and if it did not haul it, it violated the act. Such is not the case. If defendant hauled the car in use, knowing it was defective, it would be subject to a penalty. It had the right, however, to haul the car to a repair track without incurring a penalty, but such movement should, notwithstanding, be *at the sole risk of the carrier.* Clearly the facts bring this case within the Safety Appliance Act. *Otos v. Great N. R. Co.*, 128 Minn 283, 150 N. W. 922 (affirmed 239 U. S. 349); *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476; *Goucau v. M. St. P. & S. S. M. R. Co.*, —— Minn. ——, 191 N. W. 279; *Frye v. C. R. I. & P. R. Co.*, —— Minn. ——, 195 N. W. 629" (599-602).

On the question of proximate cause, which was submitted to the jury under full and complete instructions, the Supreme Court of Minnesota said:

> "2. That the defective draw-bar did proximately contribute to the injury is clearly established. As above indicated, the unbroken chain of events, from the moment the car became defective until the accident happened; the circumstances, the character of the injury, and the happening thereof, all lead to the irrepressible conclusion that the defective draw-bar was a proximate cause of the injury.
>
> The jury necessarily found, under the in-

structions of the court, that the defect was the proximate cause of the injury. This conclusion is inevitable as that was a condition of plaintiff's right to recover" (602-603).

The Supreme Court also used this language:

"After this draw pulled out there was not any new intervening cause of itself sufficient to stand as the cause of the injury" (612).

ARGUMENT.

Writ Was Improvidently Granted.

The Federal Statute.

That under the Federal statute the defendant was bound absolutely and unconditionally to maintain its appliances in proper condition, will not be disputed.

In addition to the general, absolute and unqualified duty provided in the Safety Appliance Act, it is provided in Section 4 of the Act of 1910 as follows:

"Such movement or hauling of such car shall be *at the sole risk of the carrier,* and nothing in this section shall be construed to *relieve* such carrier from *liability in any remedial action* for the death or injury of any railroad employee caused to such employee *by reason of or in connection with the movement* or *hauling* of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and *nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains* instead of *draw-bars,*

> in revenue trains or *in association with other cars* that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

Petitioner did not apprise the court of the true facts in the petition for writ of certiorari.

On page 6 of the petition for certiorari petitioner says:

> "In starting the train a draw-bar was pulled out and an immediate stop was made."

This statement is misleading. The court might well receive the impression from this statement that the defective car was stopped and there was to be no further movement thereof. It was, however, the intention to switch this car out of the train (35).

The conductor, O'Leary, testified:

> "Well, we done that. We backed up and put the chain on this car and pulled the rear end of the train into the side track" (34).

This was the first movement made with the defective car.

On page 7 of the petition this statement appears:

> "After the train had come to a stop on the passing track, Brakeman Quist was told *by Ring* to cut off the engine, and bring it to the rear of the train."

This statement and others in the petition might lead the court to believe that Ring, the decedent, was the party *giving the directions* as to the movement of the train. This was not the fact.

O'Leary testified:

"Q. And when you discovered that (that the draw-bar was pulled out) what did you do?

A. *I sent this brakeman,* Ring,—the train stood on a reverse curve at the time,—and *I sent this brakeman,* Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side track" (33-34).

Ring in giving directions to Quist was *simply following the orders which his superior,* the conductor, O'Leary, had given to him.

On page 8 of the petition it is said:

"Ring gave no warning to the engineer that he was going between the cars."

The undisputed evidence is that decedent Ring was *working under the conductor,* O'Leary.

"Q. *And you* (O'Leary) *were in charge of the train as conductor?*

A. *Yes, sir*" (39).

O'Leary further testified:

"I asked him if he could unhook the chain and he said he didn't know, and he set down his lantern and he tried and he couldn't do it" (36).

The statement in the petition for writ of certiorari that Ring gave no warning to the engineer that he was going between the cars was clearly misleading. Ring was only a subordinate, O'Leary was his superior in authority.

Under the heading, "The Questions Involved," petitioner in the application for writ of certiorari

stated several reasons why this court should grant the writ.

The reasons are based on incorrect statements of fact and we desire to call the court's attention thereto.

We quote from the petition:

> "First: The facts do not bring the case within the Safety Appliance Act. The car had come to rest on the side track and had ceased to be 'used,' as contemplated by the Act" (P. 9 of petition).

This statement is not borne out by the record and is incorrect.

The car had *not come to rest* on the side track. As Conductor O'Leary, testified:

> "We stopped *to head in at Budd* to meet an east bound train and in starting we pulled the draw-bar out" (33).

This was not a case of working on a car which had been placed on a dead track.

There was further work to be done with this car, and it had not yet been taken out of the train.

Conductor O'Leary testified:

> "Yes, I told Ring and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train*" (35).

Chief Justice Wilson, in the opinion of the Supreme Court of Minnesota, said as to this:

> "In this case *the defective car was not yet placed to be left, and in fact the equipment, the chain, used to replace the defective coupling,*

was still intact and the car remained in the train of which it was a part" (599).

Had the car come to rest on a side track and had it not been in use, if it were not being hauled or moved, as was the case in *McCalmont v. Penn. R. Co.*, 283 Fed. 736, relied on by petitioner, this court could well have granted the petition for the writ of certiorari to review the question of the liability of the railway company.

The facts are not as stated in the petition, however. The car, under the undisputed evidence, had *not* come to rest and had *not* ceased to be used.

We speak advisedly when we say, "under the undisputed evidence." There was no evidence to contradict the evidence of the conductor, O'Leary.

In the petition it is also said:

> "Second: The defective draw-bar did not proximately contribute to the injury" (P. 9 of petition).

Following this, it is stated that there were three active forces intervening:

1. That Ring sent the brakeman, Quist, with directions to cut off the engine, and, as stated in the petition on page 9 thereof, "It was in carrying out *Ring's directions* that any motion of the train took place. *Ring controlled the movement of the train."*

Ring was *not* in charge of the train. *Conductor O'Leary was in charge of the train.* As appears from his testimony heretofore quoted:

> *"I sent this brakeman,* Ring, over to tell the head man to get where he could make signals" (34).

Further, as appears from O'Leary's testimony:

"Q. And *you were in charge* of the train as conductor?

A. *Yes, sir*" (39).

To sustain its *claim that Ring controlled the movement* of the train, the railway company cites folios 298-300. This refers to the record in the Supreme Court of Minnesota.

The same evidence is found in the record in this court at folios 297-300.

What is this testimony petitioner claims sustains the contention that Ring controlled the movement of the car?

For the convenience of the court, we quote from the testimony of Quist:

"Q. And then what did you do?

A. I stayed right there and waited a few minutes, not so very long, and got a signal to go ahead.

Q. And then what was done?

A. And then I says, what happened back there, did we get a draw-bar? Yes.

Q. Who did you say that to?

A. To Ring.

Q. Did Ring answer?

A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear. He says, that remains to be seen, go ahead and pull him in, and come around with the engine.

Q. What does that mean?

A. Well, *I took it to mean* that I should go in and go around with the engine.

Q. That expression?

A. That means that, to go around about my

business, to go up there and get into clear, and come back.

Q. Cut off the engine?

A. Yes, cut off the engine, and come back.

Q. Was that done?

A. Yes, sir.

Q. And the train was pulled in onto the passing track?

A. Yes, sir" (297-299).

This testimony does not sustain the statement in the petition that it was in carrying out Ring's directions that the train moved and that *Ring controlled the movement thereof.* Anything Ring said or did was said or done under the orders of his superior, Conductor O'Leary.

2. Petitioner further says that an active force intervening so as not to make the draw-bar the proximate cause of the injury was the act of decedent in knowingly placing himself between the cars without notifying the engine crew, and that this, together with the instructions to Quist to cut off the engine, was more than contributory negligence.

A complete answer to this is the testimony of the conductor that Ring was working and acting under his directions and that he, the conductor, was in charge of the train.

3. It is claimed that when the train started in motion decedent did not *get out promptly,* and that his act, therefore, was the sole cause of his death.

It is stated on page 10 of the petition:

> "The emergency was created by Ring's instructions to Quist, and Ring's going between the cars without notice to Quist or the engine men."

Again, we call the attention of the court to the fact that O'Leary was the conductor in charge of the train; that Ring gave no instructions; that he simply repeated what the conductor told him to; that Ring went between the cars to unhook the chain *at the direction of the conductor.*

> "I asked him if he could unhook the chain, and he said he didn't know, and he set down his lantern and he tried and he couldn't do it" (36).

Furthermore, the most that could be said for the defendant is that the decedent may have been guilty of some *contributory negligence* in failing to get out from between the cars, as promptly as he should have.

The Minnesota Supreme Court held that there were no active forces intervening to break the chain of proximate cause.

We quote further from the opinion of the Minnesota court:

> *"There was here no break in the chain of events* between the pulling out of the draw-bar and the injury" (600).

On page 10 of the petition, it is stated that

> "the probability that the injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely that it could not reasonably be foreseen."

This, of course, does not involve any statement of fact which would justify the issuance of the writ.

The violation of the statute was negligence *per se.*

San Antonio v. Wagner, 241 U. S. 476, 60 L. Ed. 1110.

The railroad company was liable for any injury proximately flowing from that violation.

Davis, Agent v. Wolfe, 44 S. C. 64.

On page 10 of the petition, it is said that the question of the *violation of rules* should have been submitted to the jury. As to this question, the Minnesota Supreme Court said:

> "If decedent violated the rules and in that respect was guilty of *negligence*, himself, which *contributed* to the injury, that fact would not bar a recovery. Sec. 3, Act of April 22, 1908, 35 Stat. at L. p. 65, ch. 149; *Fletcher v. S. D. Cen. R. Co.*, 155 N. W. 3; *Grand Trunk v. Lindsay*, 233 U. S. 42."

On page 13 of the brief in support of the petition for writ of certiorari, petitioner states that the McCalmont case is in point, and on pages 13 and 14 this language with reference to the facts in the case at bar is used:

> "The car was safely shoved in *to rest* on the siding and at that moment, having so been placed on this side track, it ceased to be 'used' by the carrier."

Were this the fact, it might afford ground for the granting of the writ. This statement is *not borne out by the record* and undoubtedly was misleading to the court.

The car in the case at bar had *not yet been taken out of the train.* It had not ceased to be "used," and had not come to rest. It was in the process of being moved *for the purpose of switching it out of the train* when decedent was killed.

As Conductor O'Leary testified:

> "'We backed up and put the chain on this car and pulled the rear end of the train into the side track. * * * I told Ring and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train.* * * * After we got on the side track I was in the rear end of the train and Ring was up by this car that had the draw-bar out * * * and I asked him if he could unhook the chain * * * and he tried and couldn't do it. * * * He reached down to lift up the chain to give the slack to me so I could pull the chain, and the train backed up" (34-37).

It is significant that in the petition for certiorari petitioner does not state any folio or place in the record where evidence may be found to sustain the *claim* that the car was "safely shoved in to rest on the siding."

Had the car been at rest on the siding, and had the car not been in use, the doctrine of the Conarty and Lang cases might have been applicable, also the McCalmont case relied on by petitioner, but the facts were entirely different.

On page 14 of the petition the McCalmont case is quoted from as follows:

> "The defendant was not hauling it or permitting it to be hauled or used on its line. It had taken it out of use and placed it *on a dead track.*"

Following this, on page 15, petitioner says:

> "Now, in *that* case, and *in the one under discussion,* the *salient points* are the *same.*"

The salient points are not the same, and in the case at bar the car was still being *hauled, moved* and *used;* it was not taken out of use; and it was not placed on a *dead track,* or any other track. It was still in the train when Ring was killed.

Further, on page 15, petitioner says:

> "If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate the law."

We again call the attention of the court to the testimony of Conductor O'Leary relative to what was further to be done with the car:

> "We would *switch it out of the train*" (35).

After so stating the facts as to give the court the impression that the car was a stationary one, *dead,* and *at rest* on a side track, petitioner cites many cases holding that employees working about such *dead* and stationary cars who were injured because of defects in draw-bars or couplers are not entitled to the benefit of the Safety Appliance Act.

Such cases have no bearing whatever upon the case at bar, because the car in question had not come to rest; it was not taken out of the train; it was still in use, and was still a part of the same train which had just come into the Station of Budd.

> See opinion of Minnesota Supreme Court, folio 600.

We cannot escape the conclusion that the writ was improvidently granted.

CAUSE WILL BE DISMISSED WHERE WRIT IMPROVIDENTLY GRANTED.

In *Furness, Withy, etc. Co. v. Yang-tsze,* 242 U. S. 430, 61 L. Ed. 409, in the opinion by Mr. Justice McReynolds, it was said:

> "The writ of certiorari was *improvidently granted* and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation of the situation had then been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever, in the progress of the cause, facts develop which, if disclosed on the application, would have induced a refusal, the court may, upon motion by a party, or *ex mero motu,* dismiss the writ."

As to the cases when writs of certiorari would be granted, it was said in the early case of *Forsyth v. Hammond,* 166 U. S. 504, 41 L. Ed. 1095:

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding *conflict* between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Manifestly from the record in this case, the question involved is not one of great public moment or importance. Furthermore, the question has been settled and determined by many decisions of this court. The *lower courts were unanimous* in holding the defendant liable for the death of Ring.

In the later case of *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. Ed. 395, it was said that where a writ of certiorari was improvidently granted it would be dismissed.

In the recent case of *Southern Power Co. v. North Carolina Public Serv. Co.*, decided January 7th, 1924, 44 S. C. 164, Mr. Justice McReynolds again called attention to the fact that in petitions for certiorari there was a "necessity for clear definite and complete disclosures concerning the controversy."

Where there was not such a complete disclosure, it was said that the writ would be dismissed.

In that case, the petition stated "that the cause involved a grave question of vital importance to the public," as does the petition in the case at bar.

In neither case was such statement sustained by the record.

In the Southern Power Co. case there was no question of "vital importance to the public," but the question was, as stated by Mr. Justice McReynolds "primarily a question of fact" • • • which "if sufficiently developed would not have moved us" to grant the writ.

IF THE WRIT BE NOT DISMISSED, THE JUDGMENT SHOULD NEVERTHELESS BE AFFIRMED.

This is a simple case for damages for personal injuries resulting in the death of a railway freight brakeman. The brakeman was killed while between cars which were chained together because of a defective draw-bar.

It was the intention to take the defective car to the side track and *then* to switch it out of the train. The movement, according to the undisputed testimony, had *not been completed.*

Decedent at the request and direction of a superior officer, the conductor, went between the ends of the defective car and the adjoining car to unhook the chain. In the movement of the cars, he was killed.

It has been settled by the decisions of this court in *Great N. R. Co. v. Otos,* 239 U. S. 349, 60 L. Ed. 322, that the defendant is liable for injuries or death resulting when a defective car is being taken to a side track for repairs.

In that case, Mr. Justice Holmes said:

> "It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress. *Delk v. St. L. & S. F. R. Co.,* 220 U. S. 580, 55 L. Ed. 590, 31 S. C. 617. As the Safety Appliance Act governed this case, it imposed an absolute liability upon the carrier."

After referring to the Supplementary Act of April 14, 1910, providing that carriers might move cars to a repair track without being subject to the penalty, but that such movement should be *at the sole risk of the carrier,* Mr. Justice Holmes further said:

> "Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, *the Act of 1910 imports, with unmistakable iteration, that the liability exists.*"

On the question of proximate cause the Otos case is also determinative of the case at bar.

The trial court properly defined proximate cause in its instructions to the jury, and the jury were told that unless the defect did constitute the proximate cause of the injury, there could be no recovery.

We quote from the instruction of the trial court to the jury:

> "Unless the defective condition of the coupling was the proximate cause of the injury to decedent, the plaintiff cannot recover" (520).

Apropos is the language of Mr. Justice Holmes in the Otos case wherein he said:

> "Under the instructions of the court the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover."

CASE INVOLVES ONLY AN APPECIATION OF THE FACTS.

This case involves but an appreciation of the facts and the question whether from such facts a liability exists. The lower courts both concurred in holding that such liability did exist.

There is no question of construction of the statute involved, and this case falls within the cases of which *Great N. R. Co. v. Knapp,* 240 U. S. 464, 60 L. Ed. 745, are typical.

In that case Mr. Justice Hughes said:

> "The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act, or as to the definition of legal principle in its application, but

simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion."

The Knapp case was a personal injury case involving an injury to an employee working about a pumping station. The questions of assumption of risk, proximate cause, etc. were raised in that case, as in the case at bar.

We very respectfully submit to the court that the writ of certiorari should be dismissed.

If the writ be not dismissed the judgment of the Minnesota court should be affirmed.

IF MOTIONS TO DISMISS OR AFFIRM BE DENIED THE CAUSE SHOULD BE ADVANCED.

The practice of railway companies in filing petitions for writs of certiorari in simple personal injury cases is a continuing and a growing one.

We are constrained to the opinion that oftentimes these petitions are filed with the sole idea of "going to the highest court," before making payment to the injured man or the surviving widow.

Manifestly, there is considerable delay before the judgment of the lower court must be paid when

these petitions are filed.

Before the Act of 1913, providing that actions under the Employers' Liability Act could be reviewed only upon a petition for certiorari, it was the common practice for railway companies to sue out writs of error in nearly every case involving a substantial amount.

Congress, to stop this practice, passed the 1913 amendment, providing that such actions might be reviewed only by petition for writ of certiorari.

The case at bar involves no great legal principle.

It involves no question of construction of a Federal statute, no constitutional question; nor does it involve any great legal principle.

The decision of the case will be of importance only to the railroad company and the surviving widow and child of decedent.

The cause is one which can be adequately presented to the court within the time allotted for presenting causes on the summary docket and the avoidance of the law's delays demands that there be a speedy hearing and determination of this cause.

The questions involved are of such a nature that respondent prays that the court place the cause on the summary docket for hearing as provided by the rules of this court.

Dated at Minneapolis, Minnesota, August 4th, 1924.

Respectfully submitted,

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